

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1502

To be argued by
RAYMOND A. LEVITES

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1502

UNITED STATES OF AMERICA,

Appellee,

—v.—

CASPER ALEXANDER YASPER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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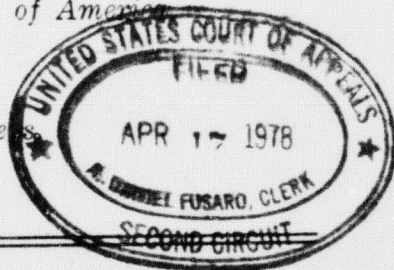




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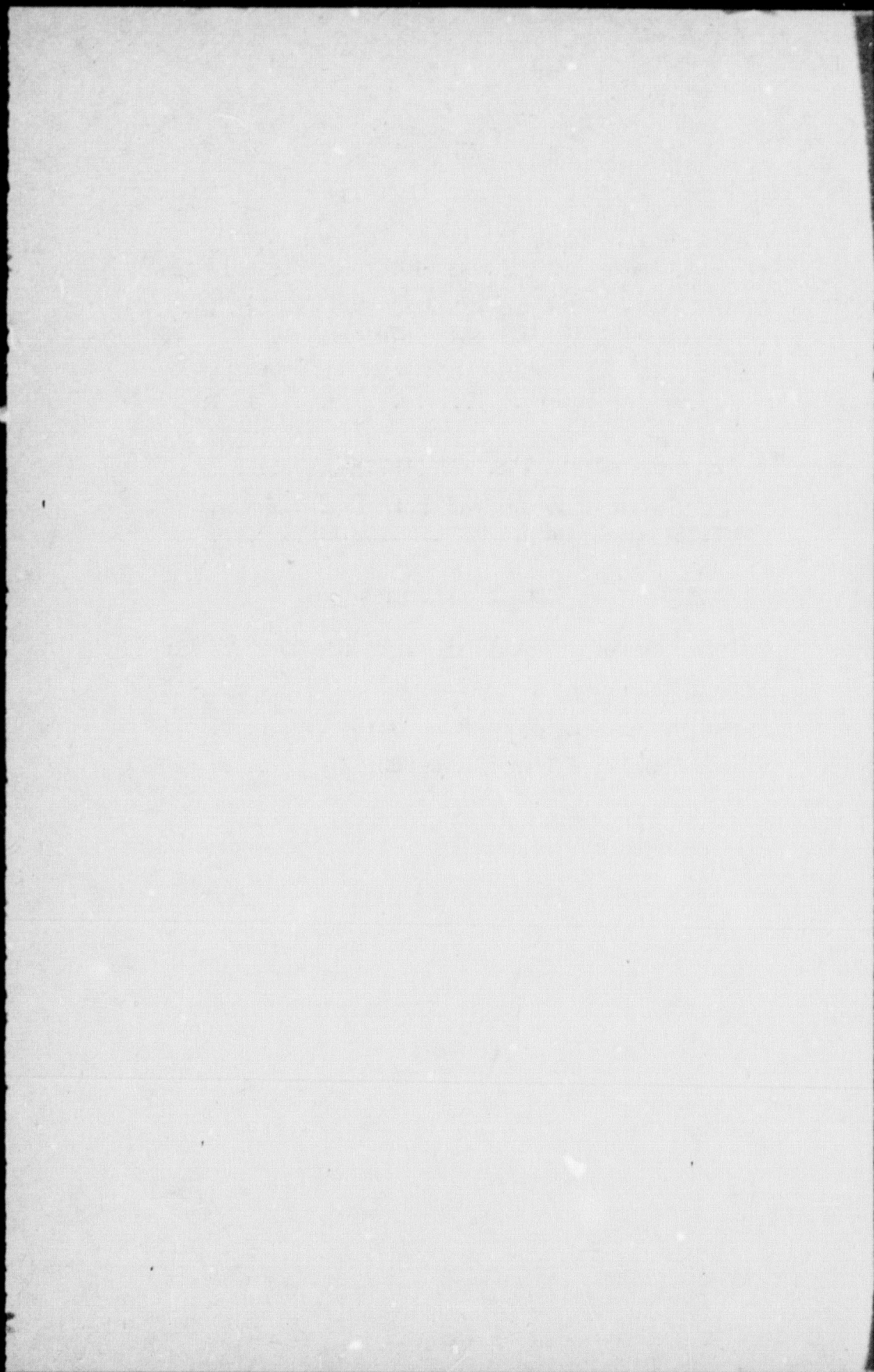
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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1502

UNITED STATES OF AMERICA,

Appellee,

—v.—

CASPER ALEXANDER YASPER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Casper Alexander Yasper appeals from a judgment of conviction entered on September 21, 1977, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 77 Cr. 421, a four count indictment, was originally filed on June 3, 1977, and was superseded on July 22, 1977.* Counts One, Three and Four charged Yasper with devising and implementing by means of the mail, a scheme to defraud in violation of Title 18, United

* The superseding indictment corrected the mailing address of the American Express Company which appeared in Counts One, Three and Four.

States Code, Section 1341. Count Two alleged that Yasper, for the purpose of carrying out the scheme used and assumed a false name, "Chester H. Yasper" in violation of Title 18, United States Code, Section 1342.

Trial commenced on July 25, 1977.* On July 29, 1977 the jury returned a verdict of guilty as to Counts One, Two and Three.

On September 21, 1977 Judge Bonsal imposed a sentence of three years confinement on each count, to run concurrently. Yasper is presently at liberty pending the disposition of this appeal.

Statement of Facts

A. Summary

In the two year period between March of 1975 and April of 1977 Casper Alexander Yasper devised and implemented a scheme to defraud the American Express Company by applying for, obtaining and using three American Express cards. In furtherance of the scheme, and in order to induce American Express to issue the cards, Yasper made a sophisticated series of false representations as to his employment, salary, financial status and personal history. Moreover, in one application he used a false name, "Chester H. Yasper", and a false address. Yasper obtained two of the three credit cards by sending his false applications to American Express in Manhattan through the United States mail. He used the three cards to run up some twenty-four thousand dollars in unpaid bills for goods and services.

* At the conclusion of the Government's case the District Judge dismissed Count Four, which had reference to a fraudulent credit card application in the name "C. Yasper", on the grounds that the Government had failed to establish the use of the mails.

The Government called representatives of the American Express Company and of Yasper's employers to prove that he had inflated his salary, exaggerated his job tenure and misrepresented his title. Dolores Watkins and Joyce French, who actually occupied the various premises Yasper had claimed as his own, demonstrated that he had falsified residential data on the applications for the cards. The Government further established through documentary exhibits the fact that the applications had been mailed, that they bore false dates of birth, a variety of social security numbers, and explicitly omitted any reference to Yasper's prior possession of six American Express cards which resulted in \$50,000 in losses to the company.

B. The Government's Case

1. The American Express Credit Card Fraud

In March of 1975 Yasper mailed the first application from Albany, New York. The application written in the defendant's handwriting bore the name "Chester H. Yasper", and the address 1649 West Mentor Street, Philadelphia, Pennsylvania.* The social security number was 580-148-904. The applicant stated that his employer had been the New York State Senate for six years and represented his position as "Counsel" at an annual salary of \$36,000. "Chester Yasper" listed his birth date as January 29, 1934 and claimed to have lived at the Philadelphia address for over four years. He instructed American Express to "print my card C. Yasper." (Tr. 25-8; GX 1).**

The second application was signed by Yasper in the name of "C. Alex Yasper" and mailed in New York City in November of 1976. It bore the address number 12C,

* The defendant stipulated at trial that each American Express application bore his handwriting. (Tr. 25, 29; GX 1, 2, 3).

** References to the trial transcript are abbreviated as "Tr."; references to Government Exhibits are abbreviated as "GX."

587 Broadway, Manands, New York. "C. Alex Yasper" gave his social security number as 071-26-4332 and the date of birth as April 14, 1934. "C. Alex Yasper" also worked in the New York State Senate, but only as a "supervisor" at a yearly salary of \$23,000. Yasper claimed to have lived at the Broadway address in Manands for four years. (Tr. 28; GX 2).

The third application, which bore no postmark, was submitted by one "C. Yasper," and was written in the defendant's handwriting. His birth date was also April 14, 1934. This Yasper worked at the New York Medical College, and used the social security number 580-01-8075. The application listed Yasper's residence as 2160 Madison Avenue, apartment 10B in New York and stated that he had lived there six years.

Each application form requested information of the applicant as to "American Express card experience" and provided boxes for the applicant to indicate whether he was a present or former cardholder in either a personal or corporate capacity. On all three applications these boxes were left unmarked, despite the fact that in 1970 and 1971 Yasper had used six different American Express cards to purchase \$51,000 in goods and services. Yasper never paid the \$51,000 he owed to American Express. (Tr. 51-55, 94-96; GX 26-31, 34-35).

The Government conclusively established that many of the statements on these three applications were false. First, Yasper provided false biographical data on the applications. His legal name was and is Casper Alexander Yasper. He was born not on January 29, 1934, nor on April 14, 1934, but on September 23, 1928 in St. Croix, the Virgin Islands. (GX 45).

Second, Yasper falsified his income and distorted the nature of his employment. Yasper was in fact employed by both the New York Medical College and the New York State Senate during the years 1975 through 1977. His

salary at the Senate was neither \$36,000, as he represented it to be on the "Chester H. Jasper" application, nor even the \$23,000 he claimed as "C. Alex Jasper". His salary was never higher than \$20,000. Jasper's actual title was special assistant to the minority leader. He never held the position of "counsel", then filled by one Jerome Kretchmer who, unlike Jasper, was an attorney, nor did Jasper ever hold any "supervisory" title. (Tr. 130-32, 180-81).

As established by Robert Matusiak, chief finance officer and custodian of all official records for the State Senate, Jasper had commenced his Senate employment as a part-time assistant to State Senator Sidney Von Luther in January of 1973. Therefore, he had not been with the Senate for six years when he completed the "Chester H. Jasper" application in March of 1975, nor for the four years claimed by "C. Alex Jasper" in the application mailed in November of 1976.

Third, in order to make it difficult, if not impossible, to run an effective credit check, Jasper used different social security numbers on the applications. Jasper's correct social security number was 580-01-0857 and not 580-01-8075, as portrayed on the "C. Jasper" application, nor the 580-148094 represented to be the number of "Chester H. Jasper", nor the 071-26-4332 claimed by "C. Alex Jasper". (Tr. 127-130, 169, 174-78, 180-183; GXs 1, 2, 3, 34-43).

Finally, Jasper's home address was falsified. Jasper's home address in the years 1975 through 1977 was not any of the addresses used on the credit card applications: 1649 West Mentor Street, Philadelphia, Pennsylvania; 587 Broadway, Apt. 12C in Manands, New York; 2160 Madison Avenue, New York.

Delores Watkins who lived at the 1649 West Mentor Street address testified that Jasper did not reside with

her, (Tr. 115-18), and Joyce French who lived at 587 Broadway testified that the defendant did not reside at that address. (Tr. 146-48).^{*} In 1975 when Yasper filed the first American Express credit card application he had informed the New York hospital that his address was 2065 First Avenue, New York, New York, but requested that they report 888 Eighth Avenue, New York, New York, for all credit references. (Tr. 359-60; GX 60).

By filing these applications with false information Yasper was able to secure the three American Express credit cards. To some extent American Express relied on outside credit companies to run a credit check on credit card applicants. Because Yasper had submitted different variations on his name, address and social security number, no derogatory information was detected or reported to American Express. (Tr. 75, 84). Moreover, American Express cross referenced all new applications in its computer to ascertain whether it had received more than one application from any given individual within a six month period. The computer system however, required a perfect match of data and would not correlate variations on a given name. American Express, as the major credit bureaus it employed, relied heavily on accurate social security numbers. Its computer could not identify two applications bearing the name Yasper as originating from a common source if the addresses, birth dates, social security numbers and first names were different. If the American Express company had known that the information provided on

^{*} Joyce French also testified that a few days before the trial had commenced, she received a telephone call from a friend who told her that she had spoken to Yasper and Yasper had told her that he would "hurt French if she (French) hurt him, because he (Yasper) had personal information on me (French)." (Tr. 162-68).

the applications was false, or that Yasper simultaneously had held more than one card, it never would have issued further cards and would have revoked those outstanding. (Tr. 73-8, 84, 101, 431-36).

Since Yasper had provided false information on the application forms, the American Express company issued a card in response to the first application on April 28, 1975. (Tr. 27; GX 1). Because of the nature of the American Express billing cycle, because he made some purchases on an extended payments plan and did in fact make sporadic payments, and because he convincingly lied to the collection department when he fell behind, Yasper was able to defer the cancellation of each of his cards in a way that would have been otherwise impossible. As each card was "used up" and ultimately revoked, he applied for, and secured, another. Ultimately Yasper acquired \$24,000 in unpaid goods and services on the three cards. (Tr. 27, 42-3, 64, 68-71, 85, 87; GXs 2 and 3).

2. Similar Act Evidence

Since Yasper's intent was the only issue in the case (Tr. 480, 483-90), the Government was allowed without objection to prove several similar acts. The Government proved that in 1970 and 1971 Yasper secured six American Express cards using false information,* and used

* Yasper characterizes the proof surrounding the six previous American Express credit cards as similar acts. While that proof was admitted properly as similar act evidence, it also was relevant as proof of the falsity of the statements on the credit card applications charged as counts in the indictment. Each application asked if the applicant had prior "American Express card experience." Yasper left that portion of each application blank. Obviously Yasper's chances of securing a credit card would have diminished substantially if he had answered that portion of the applications accurately. Yasper did not object to the admission of these six credit card applications; he only objected to the admission of the judgment of conviction pertaining to one of those six credit cards. See *infra* at 13.

these cards to purchase \$51,000 in goods and services. Jasper never paid American Express the \$51,000. (Tr. 55). Furthermore, the Government established that by using the name "Cornelius Jasper", a slightly altered version of his social security number and a false birth date, Jasper had applied for a bank loan in 1974. (Tr. 239-48; GXs 54-6). Using other variations of his name and equally false financial and personal data, Jasper had previously secured three credit cards from the Diner's Club in 1970 and incurred an unpaid balance in excess of \$11,000. In 1975 he unsuccessfully applied for additional Diner's Club credit cards by submitting two additional false applications. (Tr. 198-204; GXs 46-48, 50 and 51).*

Finally in January 1977, Jasper submitted a false credit card application for a Chase Manhattan Bank Americard. Reginald Austin, an alert security investigator at the Chase Manhattan Bank personally checked out the Manands, New York address and other false data submitted to the bank by Jasper on an application for a Chase Bank Americard. The same false address had turned up on an application for a personal loan submitted to the Chase Manhattan branch in Albany. Austin called in the postal authorities. When Jasper arrived at the

* The Diner's Club mailed a form to the address provided by Jasper, the Legislative Office Building in Albany. The form requested confirmation of Jasper's employment title, salary and "additional information which will help us evaluate [the] individual as a credit risk." The Diner's Club received a response which confirmed Jasper's position as State Senate "counsel" at a salary of \$36,000. The correspondent, on June 19, 1975 stated that Jasper had been employed at the Senate since January of 1969, and characterized him as a "good honest employee, trust him with all phases of my operation. He has a four year contract." It was purportedly signed by "Vander L. Beatty, State Senator, 23rd S.D." Expert testimony from a handwriting specialist established that Senator Beatty had not signed the signature on the Diner's Club form and that all of the printing depicting Jasper as a "good honest employee" had been inscribed by Jasper himself. (Tr. 204-06, 318-20; GXs 35, 39, 49, 58 and 59).

bank to pick up his card he was arrested, advised of his rights and confronted with various credit card applications, including those from American Express. Later, when asked about his social security number by the Assistant United States Attorney, Yasper said he had "fifty of them you'll never find out about." (Tr. 217-27, 288-90; GXs 52-3, 5)

C. The Defendant's Case

The defense called six witnesses on Yasper's behalf, including one current and one former State Senator, an Assemblyman, a personnel officer from the New York Medical College and two senior executives of the American Express Company. Yasper sought to show that he had not falsely extended his tenure as an official of the State Senate on the applications, that he had taken only permissible liberties with his job title according to the prevailing custom in Albany, and in general to develop the factual defense that American Express had been derelict in issuing him the cards and not revoking them sooner in view of what they knew or should have known about him.

Senator John Calandra initially testified that Yasper had worked at the State Senate from "roughly around 1971" when Senator Von Luther had been elected; and had also worked in the legislature for Senator Vander Beatty, a personal friend of Yasper's. Confronted with Yasper's personnel and payroll records from the legislature, which reflected employment commencing in 1973, Calandra conceded that "there is no doubt" that they were correct. Senator Calandra related that there were many people working in the legislature with different titles, including that of "counsel", and that "sometimes you create titles." He further volunteered that in a conversation with Yasper about the pending charges Yasper had told him that he had always given his "correct address of employment" and that he, Calandra had told

Yasper that the indictment was "a nothing case and the Government was being used as a collection agency." (Tr. 337-43, 346-7).

Emilio F. Carrillo, Jr., director of personnel for New York Hospital testified that Yasper currently earned \$20,382 yearly as a "full time" special assistant to the president and, with the exception of a leave of absence for prison, had been continuously employed since July of 1972. Yasper's duties included working "with the community", and "affirmative action" although he had "been instrumental in the State Senate" in terms of legislation affecting the hospital. (Tr. 356-57). Carillo denied knowledge of the fact that Yasper had at one time asked William Gordon, wage and salary administrator of the hospital, to refer to him, Yasper, as "Cornelius" and "Clarence" for credit references to finance companies and a bank, although a memo in Gordon's handwriting to that effect was in Yasper's personnel file. (Tr. 360-61, 368; GX 61).

Sidney Von Luther, formerly State Senator and Vice President of Local 1199 of the hospital workers union, had organized Flower Fifth Avenue Hospital of the New York Medical College. Yasper had been referred to Von Luther by then Senator Seymour Thaler in 1970. Von Luther had assisted Yasper in getting his job at the hospital. Von Luther insisted that Yasper had in fact been a part time paid member of his Senate staff prior to 1973, even though the Senate personnel records, which went back as far as 1908, did not reflect that fact. (Tr. 385-87). Von Luther testified that there had been personal animosity between Yasper and Mrs. French. On further cross examination Senator Von Luther testified that the title "counsel" was "used, unfortunately, very loosely" in Albany although he personally found such practice "misleading". (Tr. 392-93, 397).

Yasper called Peter Matti and George Wolff, respectively the regional director of credit operations and

director of customer service for the American Express Company. Matti and Wolff articulated some of the factors evaluated by company analysts in assigning new applicants to "risk categories".

Matti testified that employment and length of employment were among the factors frequently considered, but that the entire process was "judgmental". In response to defense counsel's suggestion that American Express was somehow responsible for the size of the unpaid balances because it did not more promptly contact Yasper or revoke his card, Matti described American Express' extended payments plan, billing cycles, and revocation procedures. (Tr. 410-17, 422-24).

Wolff explained the reliance by American Express on outside credit bureaus. He pointed out that the application requests prior American Express experience, but testified that the company reviewed its records only when the applicant affirmatively indicated a prior history of dealing with American Express. On cross examination Wolff observed that Yasper's three applications made no mention of any such prior experience. (Tr. 435-36; GXs 1, 2, and 3).

D. The Government's Rebuttal Case

In rebuttal, the Government proved without objection Yasper's 1974 New York conviction for attempted falsification of business records in connection with his bank loan at Manufacturer's Hanover Trust. (Tr. 443-44; GX 66).

ARGUMENT

POINT I

The District Court Did Not Abuse Its Discretion In Admitting Proof Of Similar Acts.

The sole issue on this appeal is whether the trial court properly exercised its discretion in admitting evidence of uncharged crimes relating to the defendant's prior use of false variations of his name and fictitious personal and financial data to obtain credit cards and a bank loan. As we shall demonstrate, defendant's claim must fail because the evidence was highly probative on a disputed issue at trial, and the defendant failed to object to the admissibility of most of the challenged evidence.

Specifically, Yasper complains that the District Judge improperly admitted evidence of Yasper's prior acquisition of six American Express credit cards and \$51,000 in goods and services under circumstances virtually identical to those in the instant case. Yasper also objects to the admission of the 1973 judgment of conviction, by plea, to a charge of mail fraud in connection with one of those six American Express credit cards in the name "Carlos C. Yasper." (Tr. 93-96; GX 32). Second, Yasper claims that the District Judge erred in receiving evidence relating to the fact that Yasper falsely applied for five, and secured three, credit cards from the Diner's Club, again under variations of his name and social security number. Yasper further claims that the District Court erred in permitting the Government to prove his submission of a false loan application under the name "Cornelius Yasper" to the Manufacturer's Hanover Trust Company and his subsequent 1974 New York conviction for Attempted Falsification of Business Records arising out of that offense. Finally, the defendant urges that the admission of evidence pertaining to the circumstances of the arrest from which the present charges evolved re-

quires reversal because it incorporated proof of a subsequent similar act, namely, Yasper's attempt to secure a Chase Bank Americard by means of an application which bore still another social security number, an apparently false address and omitted any mention of his debts to American Express or the Diner's Club under the section "List All Present Obligations". (Br. 24).

The short and almost complete answer to Yasper's present claims is that, with one exception, he did not object below to the evidence he now contends was admitted improperly. This failure to object waives any right to appellate review of these issues.* *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977); *United States v. Fuentes*, 563 F.2d 527 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 45 U.S.L.W. 3790 (June 6, 1977); *United States v. Indiviglio*, 352 F.2d 275, 280 (2d Cir. 1965) (*en banc*) cert. denied, 383 U.S. 907 (1966).*

Indeed, not only did the defendant not object to the admissibility of the evidence he now complains was admitted improperly, but his acquiescence in the evidence's admissibility was a deliberate trial strategy. In the jury's presence Yasper's attorney expressly withdrew his initial objection to the admission of the six false American Express credit card applications which had been filed by Yasper before the three applications charged in the instant indictment, and informed Judge Bonsal and the jury that "I want them in evidence." (Tr. 52-53). Yasper's attorney stated in the jury's presence that he had no objection to the admission of the five fictitious Diner's Club credit card applications. (Tr. 497; GX 46-51).

* The only objection preserved by Yasper was made at sidebar to the introduction of Yasper's prior mail fraud conviction for the "Carlos C. Yasper" American Express application, one of the six already admitted into evidence. (Tr. 87-94; GX 28).

Thereafter, when the two fraudulent Chase Bank Americard applications were offered, Yasper had "no objection to Government Exhibits 52 and 53 going into evidence." (Tr. 218). Similarly, even before the documents were offered by the Government Yasper consented in the jury's presence to the admission of the false loan applications filed with Manufacturer's Hanover Trust Company. (Tr. 240). Finally, when the Government offered Yasper's judgment of conviction for attempted falsification of business records in connection with the Manufacturer's Hanover Trust Company loan application, Yasper's attorney stated:

"I will stipulate to it. I will mention it in my summation." (Tr. 444).*

One of Yasper's principal arguments, as fully articulated in his summation, was that he had never before denied his culpability and had pleaded guilty on two prior occasions because he had in fact been guilty. Thus, defense counsel sharply contrasted Yasper's prior misdeeds with his current plight, in effect asking the jury to draw the inference that if Yasper had pleaded guilty before, when he was guilty, he must have been innocent in the instant case when he asserted his innocence. (Tr. 485, 489). It was to develop this inference, plus the argument that Yasper, having been once burnt in his attempt to cheat American Express could never again be so audacious, and to avoid appearing an obstructionist bent on excluding evidence, that counsel made the tactical decision not only not to resist the admission of the similar act proof but rather, indeed, to welcome it. Once having chosen this course, he should not now be heard to complain that it proved unsuccessful. (Tr. 53, 478, 480, 487, 489).

* Moreover, counsel did mention the conviction in his summation. (Tr. 485, 489).

Moreover, the challenged evidence was admitted properly because some of the evidence was necessary to prove the falsity of the statements on the credit card applications charged as counts in the indictment, and the remaining evidence was clearly relevant to the defendant's intent and knowledge—issues clearly disputed by Yasper at trial. Thus, Judge Bonsal acted correctly in admitting the disputed evidence. Surely when the defendant does not object to the evidence at trial, he cannot sustain on appeal his heavy burden of demonstrating that the District Court abused his discretion and acted "arbitrarily or irrationally" in receiving the evidence. *United States v. Robinson*, 560 F.2d 507, 515 (2d Cir. 1977) (*en banc*).

The law in this circuit is clear that "[e]vidence of prior criminal acts is admissible unless offered solely to prove criminal character or disposition or the proffered evidence is of such a highly prejudicial nature as to overwhelm its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977). Thus, this Court has suggested that similar act evidence must be analyzed to determine if the evidence is relevant to an issue at trial, and if relevant whether the evidence should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice. *United States v. Benedetto*, Dkt. No. 77-1306, slip op. 1735, 1737-40 (2d Cir. February 24, 1978); *United States v. Gubelman*, Dkt. No. 77-1279, slip op. 1747, 1749-50 (2d Cir. Feb. 24, 1978). See also Rule 403, 404(b), Fed. R. Evid. Under these tests the evidence Yasper now attacks was admitted properly.

In the instant case Yasper clearly placed in issue his intent—whether he acted with the intent to defraud American Express and whether he intended to submit false statements. A reading of defense counsel's summation demonstrates that intent was at issue. He explicitly

told the jury the following: that intent was at issue in this case (Tr. 480); that the jury had to decide if Jasper presented the information on the applications with an intent to defraud American Express (Tr. 483-84); that Jasper intended to pay the company (Tr. 487); that Jasper did not intend to supply false information (Tr. 488); and finally, defense counsel ended his summation with the language that the jury would have to decide if "Yasper intended to provide American Express with false, inaccurate credit information." (Tr. 490).*

Since intent was clearly at issue, the Government was entitled to prove that on prior occasions Jasper submitted false documents to credit card companies, and to a bank. Moreover, the similar act evidence showed a general pattern to submit false loan and credit card applications. Indeed defense counsel conceded the Government's right to prove the similar acts.** Yasper did not dispute the fact

* Yasper's claims on appeal that the Government put intent at issue and the similar acts were admitted improperly because he made no opening statement are unavailing. Not only did Yasper consent to the admissibility of the similar act proof throughout the trial, but he sought to establish through the witnesses that the information on the applications was not deliberately falsified. (Tr. 77, 81, 341, 351-52, 377, 479). Obviously the defendant can put in his defense through the cross-examination of Government witnesses. See *United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976). Moreover, in a fraud case where the defendant obviously has not disputed the fact that he prepared the applications, intent is clearly at issue, and the Government cannot be expected to wait until rebuttal to offer the similar act proof when the defendant might not put in a defense case, and then argue in summation that the Government failed to establish the requisite intent to defraud or intent to file false information. See *United States v. Gardin*, 382 F.2d 601, 604 (2d Cir. 1967); *United States v. Johnson*, 382 F.2d 280, 281-82 (2d Cir. 1967).

** While objecting to the admission of a judgment of conviction, Yasper's counsel stated that he understood the need to show similar acts, and to prove the defendant's knowledge and intent. (Tr. 88-89).

that he had prepared and submitted the credit card applications charged in the indictment. He claimed, however, that he did not intend to submit false information, and he did not intend to defraud American Express. Thus, the similar act evidence was relevant to rebut these defenses.

The similarity and relevance of the similar act proof to the issues of knowledge and intent is clear. The Diner's Club and Chase Bank Americard credit card applications, like the American Express applications, contained false statements about Yasper's social security number. The Americard application contained the same false address as used by Yasper on one of his American Express card applications forming the basis for a count in the indictment. The Diner's Club application contained the same false statements as contained on the American Express application as to his salary, and his position with the state legislature. (GXs 49, 50). On the loan application to Manufacturer's Hanover Trust Company Yasper also falsified his social security number, his address, and his name. Finally, the false statements contained on the six American Express card applications filed by Yasper in 1970 and 1971 were relevant to show that he deliberately falsified the information on the applications which formed the basis of the indictment, and the fact that American Express incurred a \$51,000 loss on those cards was pertinent in rebutting Yasper's defense that he did not intend to defraud American Express.*

* Indeed as we have suggested earlier in this brief, see *supra* at 7, proof of the other American Express card applications was necessary to prove the falsity of the application charged in the indictment. See *United States v. Hockridge*, Dkt. No. 77-1243, slip op. 2133, 2148 (2d Cir. March 27, 1978). The applications asked for Yasper's prior experience with American Express, and Yasper did not answer that question despite his obvious prior experience with American Express credit cards.

In the face of Yasper's defense that he did not intend to submit false information and he did not intend to defraud American Express, the Government was entitled to elicit this proof to show that he had submitted similar false information on other occasions and that he previously had used American Express credit cards to purchase \$51,000 in goods and services which he never paid. This Court has consistently upheld the use of similar act proof to show intent and knowledge in fraud cases. See *United States v. Corr*, 543 F.2d 1042, 1053 (2d Cir. 1976); *United States v. Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Leonard*, 524 F.2d 1076, 1091-92 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Kaufman*, 453 F.2d 306, 310-11 (2d Cir. 1971); *United States v. Birrell*, 447 F.2d 1168, 1172 (2d Cir.), *cert. denied*, 404 U.S. 1025 (1971); *United States v. Bilotti*, 380 F.2d 649, *cert. denied*, 389 U.S. 944 (1967).

Yasper further contends that the evidence was impermissibly prejudicial, and even if relevant should have been excluded on that basis. In view of the highly probative nature of the challenged evidence there is simply no reason to disturb Judge Bonsal's decision to admit the evidence.* Moreover, none of the similar act evidence

* This Court has consistently concluded that the balancing of relevance against prejudice is a function primarily for the trial judge, who, in approaching the "question of whether the evidence is worth what it costs"

"... has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain."

United States v. Leonard, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Except in cases of grave abuse, "his determination will rarely be reversed on appeal." *United States v. Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). See also, *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977), (*en banc*); *United States v. Santiago*, *supra*.

was inherently inflammatory and likely to arouse the jury's passions against the defendant. See *United States v. Gubelman*, Dkt. No. 77-1279, slip op. 1747, 1752 (2d Cir. Feb. 24, 1978). The evidence simply was not of the "bloody shirt" variety where there is substantial concern that the jury will convict because the defendant is a bad person, and not because of the evidence. See *United States v. Robinson*, 560 F.2d 507, *supra*, at 514.

Moreover, we fail to understand Yasper's allegation that he suffered prejudice because cautionary instructions were not given to the jury. First, Judge Bonsal did give a cautionary instruction that the similar act evidence was only relevant in determining whether the defendant acted with the requisite knowledge and intent in making the applications which are the subject of the trial. (Tr. 515-16). The District Judge also gave a cautionary instruction during the trial. (Tr. 95). Second, Yasper did not request any cautionary instruction, and did not object to the instruction given by Judge Bonsal. He, therefore, has waived any appellate issue absent plain error. Rule 30, F.R.Crim.P.; *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977). Indeed at the conclusion of the District Court's charge Yasper's attorney characterized the charge as "very excellent." (Tr. 522).

Finally, the only proof to which Yasper has preserved his objection is the admissibility of the judgment of conviction for mail fraud arising out of his application for, and receipt of an American Express Card, under the name "Carlos C. Yasper." (Tr. 94-6, GX 28, 32). Since Yasper did not object to the admissibility of the false credit card application submitted under the name "Carlos C. Yasper," there is no basis for his objection to the use of the judgment of conviction to prove the similar act. This use of a judgment of conviction as proof of a similar

act is proper under Rule 803(22) F.R. Evid.* and the case law of this circuit. See *United States v. Eliano*, 522 F.2d 201, 202 (2d Cir. 1975) (*per curiam*) (the Court permitted the admission of a judgment as proof of a similar act); *United States v. Vario*, 484 F.2d 1052, 1054-55 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974) ("the proper way to introduce evidence of a prior conviction is to produce the judgment of conviction . . ."). See also *United States v. Morrow*, 537 F.2d 120, 147 (5th Cir. 1976); *United States v. Barclift*, 514 F.2d 1073, 1075 (9th Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States v. Olsen*, 487 F.2d 77, 79-80 (8th Cir. 1973), *cert. denied*, 415 U.S. 993 (1974). Rule 803(22) is clearly applicable for Yasper's knowledge and intent obviously were essential elements of the crime to which he had pleaded guilty.

* Rule 803(22), F.R.Evid. reads as follows:

"Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Raymond Levites being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 17th day of April, 1978
he served a copy of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

Carroll and Reid
Attorneys at Law
377 Broadway
New York, New York 10013

An deponent further says that he sealed the said
envelope and placed the same in the mail chute drop for
mailing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Raymond Levites

Sworn to before me this

17th day of April, 1978

Jacob Laufer

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Qualified in Kings County
Commission Expires March 30, 1979

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